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No.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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PHILLIPS CRANE & RIGGING OF SAN ANTONIO, INC., and DELMAR PHILLIPS,

*Appellants,*

v.

BEN B. SHAW and RUDY GARZA, as Tax Assessor-Collector of Bexar County, Texas,

*Appellees.*

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**On Appeal from the Supreme Court of Texas**

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## JURISDICTIONAL STATEMENT

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**October 19, 1982**

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## QUESTION PRESENTED

Whether a state tax collector may seize personal property to satisfy a claimed tax delinquency consistent with the Fourteenth Amendment pursuant to a statute which provides for no pre- or post-seizure review of the official's actions.

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## JURISDICTIONAL STATEMENT

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Phillips Crane & Rigging of San Antonio, Inc. and Delmar Phillips, the appellants (Phillips),[1] appeal from the final judgment of the Supreme Court of Texas, dated May 12, 1982, on which a Motion for Rehearing was overruled on July 21, 1982, holding that Article 7266, Texas Revised Civil Statutes, is not unconstitutionally repugnant to the Fourteenth Amendment to the Constitution of the United States. Ben B. Shaw was sued in both his individual and official capacities. Since the issuance of the decision sought to be reviewed, he has been succeeded in office by Rudy Garza. The appellees are described in this Jurisdictional Statement as the collector.

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[1] Phillips Crane & Rigging of Houston, Inc., is a corporation affiliated with the appellants. This disclosure is made pursuant to Supreme Court Rule 28.1.

## OPINIONS BELOW

The opinion of the Supreme Court of Texas, which is reprinted in the appendix at page 1a, is reported at 636 S.W.2d 186. The judgment of the district court dated November 19, 1981, and the stipulated facts approved by the district court on the same date are not reported. They are reprinted in the appendix at pages 16a and 18a, respectively.

## JURISDICTION

This is an appeal from a final judgment of the Supreme Court of Texas reversing the district court's holding of unconstitutionality of a state statute and vacating the permanent injunction issued by the lower court. The supreme court held that Article 7266, Texas Revised Civil Statutes is constitutional and does not violate the Due Process Clause on the Fourteenth Amendment.

The judgment of the Supreme Court of Texas was issued on May 12, 1982. A timely motion for rehearing was filed on May 27, 1982, and was denied on July 21, 1982. The judgment of the Supreme Court of Texas appears at page 6a. A notice of appeal was filed in the Supreme Court of Texas on July 26, 1982, (App. 22a) and a supplemental notice of appeal was filed in the Supreme Court of Texas on October 14, 1982. (App. 23a). This Court has jurisdiction of this appeal by virtue of 28 U.S.C. § 1257(2).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

*Fourth Amendment, United States Constitution*:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

*Fourteenth Amendment, United States Constitution*:

> No State shall make or enforce any law which shall abridge the privileges of immunities of the citizens of

the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law . . . .

*Texas Revised Civil Statutes Annotated Article 7266 (1960)*:

> If any person shall fail or refuse to pay the taxes imposed upon him or his property by law, until the first day of January next succeeding the return of the assessment roll of the county to the Comptroller, the tax collector shall, by virtue of his tax roll, seize and levy upon and sell so much personal property belonging to such person as may be sufficient to pay his taxes, together with all costs accruing thereon; provided, there shall be no levy on property when the owner thereof has the right to pay at the Comptroller's office, until a list of the persons who have paid their taxes at said office has been furnished the tax collector by the Comptroller. The Comptroller shall forward said list of paid taxes on or before the first day of February of each year; and the tax collector shall, immediately on receipt of said list from the Comptroller, levy on and sell the property of such nonresidents as have not paid their taxes, in accordance with the law regulating the sale of property for taxes.

*Texas Revised Civil Statutes Annotated Article 7273 (1960)*:

> In making sales of personal property for taxes, the collector shall give notice of the time and place of sale, together with a brief description of the property levied on and to be sold, for at least ten days previous to the day of sale, by advertisements in writing to be posted at the courthouse door, and at two other public places in the county; and such sale shall take place at the courthouse door of the county in which the assessment is made, by public auction.

## RAISING THE FEDERAL QUESTION

The federal question was raised at all stages of this proceeding. A specific holding of unconstitutionality was made by the district court (App. 16a), and the Supreme Court of Texas considered and expressly rejected the federal constitutional challenge.

## STATEMENT OF THE CASE

The facts of this case were stipulated by the parties and the stipulation was approved by the trial court. (App. 18a).

### Statement of Facts

The legal aspects of this case began on February 19, 1976, when both appellants were sued for allegedly delinquent personal property taxes. (Stip. ¶ 9, App. 19a). While this suit was still pending, Ben B. Shaw, then the Tax Assessor-Collector of Bexar County, Texas, levied upon, seized and took into his possession personal property of the appellants in order to satisfy the claimed tax delinquency. (Stip. ¶ 5, App. 18a). The taxes for which the seizure was instituted were the same taxes claimed in the collector's suit. (Stip. ¶ 11, App. 19a). By a Notice of Tax Sale, the collector proposed to sell Phillips' property 20 days later to satisfy the alleged tax delinquency. (Stip. ¶ 7, App. 18a). The fair market value of the seized property greatly exceeded the amount of taxes claimed by the collector. (Stip. ¶ 12, App. 19a-20a).

### The Proceedings Below

In response to the seizure, Phillips instituted a suit in state district court seeking to enjoin the proposed tax sale and for a declaratory judgment of the unconstitutionality of the tax seizure statute under which the collector acted. (App. 1a). The trial court denied a temporary injunction, and the interlocutory judgment was appealed. (App. 2a). The court of civil appeals issued

its own temporary injunction to preserve its jurisdiction pending a hearing on the merits.[2] (App. 2a). When the court of civil appeals considered the case on the merits, it held the challenged statute unconstitutional under the Fourteenth Amendment.[3] (App. 2a). That holding of unconstitutionality was appealed to the Supreme Court of Texas, which declined review, holding that the court of civil appeals properly decided the temporary injunction question, but expressly reserving the constitutional issue.[4] (App. 2a). The case was returned to the trial court, which held article 7266 unconstitutional and issued a permanent injunction against the sale of the seized property. (App. 2a, 16a). From that judgment, a direct appeal was taken to the Supreme Court of Texas which noted that the "sole issue before us is whether Article 7266 is unconstitutional for lack of due process safeguards." (App. 2a).

The Supreme Court of Texas considered Phillips' Fourteenth Amendment claims, and rejected them. Holding the statute constitutionally valid, the court dissolved the injunction, thus clearing the way for the sale of the property. In a timely motion for rehearing, Phillips urged that due process was not satisfied because of the lack of a provision for a pre-seizure hearing. The motion for rehearing was overruled without further opinion. (App. 6a).

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[2] The opinion of the court of civil appeals in the original injunction proceeding is reported at 607 S.W.2d 1, and is reproduced in the Appendix at page 13a.

[3] The opinion of the court of civil appeals on the merits is reported at 610 S.W.2d 533, and is included in the Appendix at page 8a.

[4] This *per curiam* opinion is reported at 615 S.W.2d 176, and is reproduced in the Appendix at page 12a.

## THE QUESTION IS SUBSTANTIAL

The question as to the constitutional permissibility of a state tax collector seizing personal property to satisfy an alleged tax delinquency without the opportunity for notice and hearing is a novel and substantial one. It has never before been treated by this Court.

### I. In Contravention of the Fourth and Fourteenth Amendments, the Decision Below Deprives an Alleged Tax Delinquent the Opportunity for Notice and Hearing Before a Deprivation of Property Occurs.

At stake here is the right of a taxpayer to notice and hearing to contest the seizure of his property for back taxes. The court below mistakenly held that Article 7266, Texas Revised Civil Statutes,[5] is constitutional when examined in light of the Due Process Clause of the Fourteenth Amendment. The court's decision effectively placed in the hands of a state administrative official the power to unilaterally determine tax disputes without judicial supervision.[6]

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[5] This statute was repealed effective January 1, 1982. Although there has been a repeal, the court below treated the question on the merits since the tax collector is still in possession of the seized property and still threatens to sell it pursuant to this statute. No mootness question was raised in the opinion below, which decided the case on the merits, and it is clear that the question is not moot. Two cases decided by this Court last Term make it clear that the mere repeal of the statute without the cessation of the collector's claims will not render the issues moot. *Mills v. Habluetzel*, —— U.S. ——, ——, 102 S. Ct. 1549, 1552, 71 L. Ed. 2d 770, 775 (1982); *City of Mesquite v. Aladdin's Castle, Inc.*, —— U.S. ——, ——, 102 S. Ct. 1070, 1074, 71 L. Ed. 2d 152, 159 (1982). This Court also undertook to decide the constitutionality of a repealed statute and rejected the appellees' suggestion of mootness in *Kirchberg v. Feenstra*, 450 U.S. 455, 459 (1981).

[6] There is no question here that the collector did not seek preseizure review of his actions; indeed, by taking matters into his own hands, he attempted to deprive the court which had already acquired jurisdiction over the tax dispute of any ability to review it at all.

This Court has previously defined the contours of due process when applied to the pre-judgment seizure of cases. *North Georgia Finishing Co. v. DiChem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). The court below, after a brief examination of these cases held that procedural due process was satisfied by article 7266.

The difficulty with the decision below is that this Court has explicitly required notice and hearing as an integral requirement of procedural due process. Just as in *Fuentes v. Shevin*,

> The primary question in the present cases is whether these state statutes are constitutionally defective in failing to provide for hearings 'at a meaningful time.' . . . The issue is whether procedural due process in the context of these cases requires an opportunity for a hearing *before* the State authorizes its agents to seize property . . . .

407 U.S. 67, 80 (1972) (emphasis in original). The requirement is clear: There must be a *prior* hearing.[7]

The only exception recognized to the requirement of a pre-seizure hearing was a vitally important governmental need requiring immediate action to protect the public. The cases cited by this Court in *Fuentes* included the urgent need for seizure of misbranded drugs, contaminated food, the assets of a failing bank and the collection of federal revenues. *Id.* at 91-92. Seizing upon this latter thought, the court below drew an improper analogy to article 7266 in an attempt to save it.

Without citing *Phillips v. Commissioner*, 283 U.S. 589 (1931), the court below relied upon it as authority for the proposition that a seizure of property is permissible

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[7] The Texas statute does not even provide for any sort of post-seizure review, unlike those involved and found constitutionally void in *Fuentes*.

so long as the reason is the collection of taxes. *Phillips* does not go so far as to give carte blanche to every seizure done in the name of tax collection.

The seizure in *Phillips* was specifically upheld because there was a clear statutory scheme for a post-seizure determination of tax liability. The burden of proof was on the Commissioner of Internal Revenue.[8] *Id.* at 598. The Court was also impressed by the fact that the taxpayer could have a remedy before payment of taxes, without the necessity of a bond. *Id.* at 598.

The currency of *Phillips* is open to question. Mr. Justice Powell, concurring in *North Georgia Finishing Co. v. DiChem, Inc.*, quoted from *Phillips* and then questioned its validity:

> But the recent expansion of concepts of procedural due process requires a more careful assessment of the nature of the governmental function served by the challenged procedure and of the costs the procedure exacts of private interests.

419 U.S. 601, 610 (1975). This subtle criticism suggests that *Phillips* should be limited to its narrow facts and to the collection of federal taxes.

Beyond these difficulties, the statute here drawn into question does not represent "strict control" of the state's "legitimate force". *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972). The statute is anything but narrowly drawn,

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[8] The decision below, by suggesting in dicta that the appellants could have filed a suit for refund of any improperly collected amounts, has impermissibly shifted the burden of proof from the seizing party to the property owner. This is particularly the case since the collector is not in the first instance required to make any showing of even a minimal justification for a seizure. There can be no question that the thrust of this Court's opinion in *Fuentes* requires that the burden of proof be placed on the party seeking the deprivation of property. *Goldberg v. Kelly*, 397 U.S. 254 (1970) clearly stands for the notion that the risk of mistake is to be borne by the state. *Id.* at 265-67.

which is a clear prerequisite to constitutional validity. The statute does not "limit the summary seizure of goods to special situations demanding prompt action." *Id.* at 93. Indeed, no need for prompt action has been demonstrated by the collector, either on the record in this proceeding nor in the decisions below. Simply stated, "no such unusual situation is presented by the facts". *Id.* at 93.

### II. The Decision Below Impermissibly Deprives a Taxpayer of His Property Without Due Process of Law, Even if a Refund Might Be Available.

The court below chose a simple answer to an important problem by suggesting that a taxpayer whose property is seized might obtain a refund of any improperly collected taxes.[9] Even if there could be a post-seizure suit for a refund of the taxes, this is no substitute for a prior hearing. *Sniadach*, *Fuentes*, and *North Georgia Finishing* all hold that pre-seizure review is fundamental; even in those narrow instances where a vital public need requires a hearing to be postponed until after the seizure at issue, a hearing nonetheless must be had. The statute now under examination admits of no hearing at all, either before or after seizure.[10]

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[9] The court cited as authority for its dicta four distinguishable cases. None have ever before been held to stand for the proposition that a suit may be maintained against a county tax collector to recover improperly collected taxes. Indeed, the court of civil appeals recognized that there is no procedure under Texas law to sue for a refund. 610 S.W.2d 533, 534. (App. 10a). None of the cases relied upon by the supreme court dealt with a seizure.

[10] In *Fuentes* this Court commented on the inequity of statutes which deprive a person of property rights without a prior adjudicative hearing, or at least an impartial review:

> Both *Sniadach* and *Bell* [*v. Burson*] involved taking of property pending a final judgment in an underlying dispute. In both cases, the challenged statutes involved recovery provisions,

The difficulty with the court's refund approach—in addition to the fact that Texas law has not previously recognized a refund suit for personal property taxes—is that the burden of proof is improperly shifted to the owner of the property rather than upon those who seized it. *Cf. Stypmann v. City & County of San Francisco*, 557 F.2d 1338, 1343 (9th Cir. 1977). The taxpayer, moreover, is deprived the use of his money during the period involved in prosecuting a refund suit, not to mention the unrecoverable expenses incident to litigation. *Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980).

Thus it is clear that a separate refund cannot serve as a substitute for pre-seizure notice and hearing. The Court has previously rejected such reasoning:

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.'

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allowing the defendants to post security to quickly regain the property taken from them. Yet the Court firmly held that these were deprivations of property that had to be preceded by a fair hearing.

*Id.* at 85. Unlike the statutes in those cases, the seizure provision here admits of absolutely no recovery of the property levied upon and seized, short of paying the disputed tax.

*Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972).[11] These observations are equally applicable to the refund suit solution posed by the court below: The principal distinction, however, is that a refund action involves both a deprivation for a greater period of time and considerably more expense in obtaining a recovery, thus leading to an even less complete remedy.

The court below also held that the present litigation serves as a suitable substitute for a pre-seizure hearing. (App. 5a). The fact that article 7273 provides for 10 days' notice prior to the sale of seized property does not provide due process to a taxpayer. The decision below has implied that this 10-day period should be used to institute a separate action for judicial review.[12] What the opinion does not discuss is that a taxpayer must within that brief period begin a legal challenge to the seizure

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[11] Any suggestion that *Fuentes* should be limited to consumer transactions involving private parties is surely undercut by *Goldberg v. Kelly*, 397 U.S. 254 (1970), which noted the importance of a prior hearing when applied to governmental benefits.

[12] The collector pressed forward with an argument which apparently seduced the court below. He pointed out that Phillips had begun just such a legal battle during the post-seizure pre-sale hiatus, and that this is all the judicial review to which it or any other taxpayer has a right to expect. The district court in the first instance denied the applications for both a temporary restraining order and a temporary injunction seeking to delay the sale. (App. 1a). Phillips then had to obtain, in an extraordinary proceeding, a temporary injunction from the court of civil appeals, the granting of which was conditioned on a bond. (App. 13a). There was then a plenary review of the trial court's action by the appeals court, and the subsequent application for writ of error in the Texas Supreme Court. The case was returned to the district court, resulting in a direct appeal to the state supreme court. Review by appeal in this Court is now being sought. This can hardly be viewed as pedestrian litigation of the routine sort, nor can it be regarded as inexpensive. Given the great difficulties involved and the attendant financial and time demands, it cannot be said in candor that this proceeding has constituted a viable alternative to pre-seizure review, particularly in cases where the amounts are small or the taxpayers unsophisticated. *Cf. Fuentes v. Shevin*, 407 U.S. 67, 83 n.13 (1972).

and obtain an injunction to stay the scheduled sale. In such a short time frame only a temporary injunction could be obtained, and the granting of such an injunction is by no means certain. Indeed, the standard of review on appeal is whether the district court abused its discretion in refusing to grant a temporary injunction.

The opinion below further holds that due process is only necessary in the assessment of taxes and not in their collection. (App. 3a). Such a holding is both remarkable and unsupportable. The notice and hearing given in the assessment of taxes has absolutely nothing to do with their collection; even though the taxpayer might have no quarrel with the assessment, he might have a dispute as to the amount of taxes being claimed by the collector.

**III. The Decision Below Misunderstands this Court's Holdings in *Sniadach*, *Fuentes* and *North Georgia Finishing* and, if Allowed to Stand, Would Encourage Other States to Engage in Summary Seizures Without an Opportunity for Notice and Hearing.**

There is no doubt that a state tax collecting authority can generate revenues much more rapidly if it is not burdened with having to accord notice and hearing before summarily seizing a taxpayer's property. The collecting authority is also saved the expense and delays necessarily attendant with the holding of pre-seizure hearings, thereby conserving tax dollars. Taxpayers who have genuine concerns about the propriety of the taxes or the amounts claimed would be encouraged to pay up without voicing their reservations in order to avoid the inconvenience and public embarrassment of a seizure. Collections would thus undoubtedly improve and the gross dollars received by the tax collector naturally increase. In a tightening economy, where tax delinquencies tend to rise, a short-cut collection procedure becomes even more tempting. And where the collector is an elected official, his political appearance would be enhanced through his ability to point to an increase in tax collections.

But this corner-cutting would be constitutionally expensive. The due process requirement of notice and hearing would necessarily be eroded. There would be no opportunity for the hearing which this Court has recognized "must be provided before the deprivation at issue takes effect." *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972). The decision of the court below therefore opens a Pandora's box which can only be sealed through a reversal.

In addition to *Fuentes*, this Court has decided two other cases having a direct impact on this appeal. *North Georgia Finishing, Inc. v. DiChem, Inc.*, 419 U.S. 601 (1975); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). In each of these opinions, no inquiry was ever made by the Court into the merits of the creditors' claims; the Court was apparently unconcerned whether the defendants whose property was summarily seized actually owed what the plaintiffs claimed. Implicit in each of these cases is that the end does not justify the means.

The decision below misinterprets these cases and implicitly holds that the trappings of due process are dispensable or at least optional with the administrative official when he is collecting taxes. This the court below holds to be true even where no emergency justifying quick action is shown. Since the end does not justify the means, the judgment of the lower court should be reversed.

## CONCLUSION

For the important reasons set forth above, this Court should note probable jurisdiction to review the opinion and judgment of the court below.

Respectfully submitted,

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